STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2014
v	No. 313580 Oakland Circuit Court
RODNEY FRANK CHISM, Defendant-Appellant.	LC No. 2012-239900-FC

Before: MURPHY, C.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals by right his convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13). We affirm.

Defendant was employed as a piano instructor and the victim began taking piano lessons from him when she was eleven years old and stopped the lessons when she was under the age of 13. She testified that a couple of months after the start of the lessons defendant began putting his hand on her knee and then continued moving it higher up her leg. Later, defendant began to use his left hand to reach inside her pants, push away her underwear, and move his finger in between the lips of her vagina. She further testified that defendant touched her breasts on one occasion. The victim never protested the touching due to being afraid of getting hurt by defendant. She also did not mention the sexual assaults to her parents, but later on told a couple of her friends, who contacted the high school counselor and an investigation began.

During the investigation, the police asked defendant if he was willing to come in for an interview. Defendant agreed and attempted to consult an attorney prior to coming to the interview. Defendant confessed to sexually assaulting the victim in a recorded interview with Sergeant Michael Crum.

Defendant first argues that his confession was not voluntary and that the trial court erred in not granting his motion to suppress. "When reviewing a trial court's determination of the voluntariness of inculpatory statements, this Court must examine the entire record and make an independent determination, but will not disturb the trial court's factual findings absent clear error." *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). "A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake was made." *Id.* "[D]eference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses." *Id.*

The admissibility of a particular statement is evaluated based on the totality of the circumstances surrounding the circumstances of the statement. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). To determine whether the statement was freely and voluntarily made, the following factors are taken into consideration:

> "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse." *Id*.

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness." *Id*. Moreover, even if "coercive police conduct" is present, if "no causal connection" exists between the conduct and confession, "then a confession will be found to be voluntary if the other circumstances show that the defendant gave his confession freely and voluntarily." *People v Wells*, 238 Mich App 383, 388-389; 605 NW2d 374 (1999).

A review of the *Cipriano* factors supports the trial court's finding of voluntariness. Defendant was 50 years old at the time of the interview, had some college education, had a prior DUI conviction, which led to police interaction, and was not subject to long, repeated, and prolonged questioning because he admitted to performing acts with the victim only 28 minutes into the interview. Moreover, defendant went to the interview voluntarily after attempting to contact his attorney, was not deprived of food, sleep, or medical attention, was not physically abused, and defendant does not argue that he was not informed of his constitutional rights.

The trial court found that Crum's statement addressed to defendant of "[d]o we charge [defendant] with, you know, 20 different felonies that have 200 years in prison time, and I hate to talk about a thing like that . . . or do we charge [defendant] with a misdemeanor" was not a promise of leniency. We conclude that this finding was not clearly erroneous.

"The inquiry will be whether the defendant is likely to have reasonably understood the statements in question to be promises of leniency." *People v Conte*, 421 Mich 704, 740; 365 NW2d 648 (1984). "The promise, however, must have more than an attenuated causal connection with the confession, but need not be the only or even principal motivating factor." *Id.* at 741. The trial court noted that Crum was "trying to figure out the facts" and the statements were "fair statements to make" when the charges depended on the facts. Additionally, the trial court found that defendant could not reasonably believe that Crum had the power to make the decision on what charges to bring because defendant expressed that he knew Crum still had to bring the case to the prosecutor. The trial court's finding that Crum's statements were not promises of leniency was not error.

Defendant additionally argues that Crum's threats of media exposure and statement that

and "[i]f you're going to bury your head in the sand, it's going to be a freight train" induced his confession. "A confession is involuntary if obtained by any sort of threat or violence, by any promises, express or implied, or by the exertion of any improper influence." *People v Paintman*, 139 Mich App 161, 171; 361 NW2d 755 (1984).

We agree with the trial court that the challenged statements threatened defendant with negative media exposure, which Crum noted would result in a loss of business, and also threatened defendant with exponential punishment if he did not tell the truth. Thus, the statements were "any sort of threat" under *Paintman*, 139 Mich App at 171. However, we also agree with the trial court that, although the comments were inappropriate and could be construed as threats, based on the totality of the circumstances, the confession was still voluntary. Here, a review of the *Cipriano* factors supports a finding of voluntariness. Moreover, Crum's demeanor and language during the interview was not threatening, and in the video, defendant does not appear stressed, nervous, or mentally fatigued in any way. Although defendant testified that he confessed because of the statements, "deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses." *Shipley*, 256 Mich App at 373. After a review of the record, including the video recording of the interview, we conclude that the trial courts finding that the confession was voluntary under the totality of the circumstances, even with the presence of threats, was not clearly erroneous. We are not left "with a definite and firm conviction that a mistake was made." *Shipley*, 256 Mich App at 373.

Defendant next argues that the trial court abused its discretion in denying his motion for mistrial. Defendant's confession was played for the jury, and during the interview, Crum stated that he believed the victim. Defendant moved for mistrial on the grounds that this was improper vouching. However, defendant waived review of this issue as defense counsel ultimately agreed to play the entire recorded confession for the jury.

Waiver is the "intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), reversed on other grounds in *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). After discussing which portions of defendant's recorded confession to potentially mute for the jury, defense counsel stated, "I guess if you're going to play it, play the whole thing." Defense counsel had a copy of the transcript before trial, yet he failed to object during a discussion of whether the video should be played in its entirety, told the court to play the entire video, and only objected to statements in the video after the video was played in its entirety to the jury. Thus, defendant contributed to this error through his own negligence. Such negligence constitutes defendant's waiver of review of this issue. Therefore, defendant's waiver extinguished any potential error that he later tried to use as a basis for mistrial.

Nevertheless, we review the denial of the mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). Crum's statement about the victim's credibility was inadmissible because it did not provide context to defendant's statement, was not relevant, and its probative value was substantially outweighed by the risk of undue prejudice, MRE 403. *People v Musser*, 494 Mich 337, 363; 835 NW2d 319 (2013). We find, however, that any error in introducing the evidence was harmless. "[E]rror is presumed not to be a ground for

reversal unless it affirmatively appears that, more probably than not, it was outcome determinative." *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). "[A]n error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *Id.* "That determination requires that we 'focus on the nature of the error in light of the weight and strength of the untainted evidence.'" *Id.*

Here, there was no conflict between defendant's version of the events and the victim's testimony; defendant's properly admitted confession directly corroborated the victim's testimony. Defendant confessed that he rubbed up the victim's thigh, rubbed her breast, and rubbed his fingers on her vagina. Defendant stated that the victim did not react at all when he performed these acts and noted that he used his left hand. The victim testified that defendant began by touching her knee and moved up her leg. She testified that defendant also touched her breasts and vagina. She testified that she did not react at all when defendant touched her and testified that defendant used his left hand. Therefore, the statement vouching for the victim, while improper and inadmissible, was not "outcome determinative" in light of the direct corroboration of the victim's testimony. Because the error was harmless, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Amy Ronayne Krause